

U.S. Department of Labor

Office of Administrative Law Judges
Seven Parkway Center - Room 290
Pittsburgh, PA 15220

(412) 644-5754
(412) 644-5005 (FAX)



Issue Date: 16 May 2003

CASE NO: 2002-MSA-3

In the matter of

RAG EMERALD RESOURCES CORP.
Petitioner

v.

MINE SAFETY AND HEALTH ADMINISTRATION
Party Opposing Petition

and

INTERNATIONAL UNION, UNITED MINE WORKERS
OF AMERICA
Party-In-Interest

APPEARANCES:

R. Henry Moore, Esquire
For the Petitioner

Robert A. Cohen, Esquire
For the Party Opposing Petition

Mr. James P. Lamont
For the Party-in-Interest.

BEFORE: The Honorable Gerald M. Tierney
Administrative Law Judge

DECISION AND ORDER

This matter is before me pursuant to a Petition for Modification of Application of Mandatory Safety Standard 30 C.F.R. § 75.360(b)(10) filed under Section 101 (c) of the Federal Mine Safety and Health Act of 1977 (hereinafter the “Act”), 30 U.S.C.A. §§801, et seq.

I. History of the Case

Rag Emerald Resources (hereinafter “Petitioner”), operates the Emerald Coal Mine (MSHA I.D. 36-05466) which is located near Waynesburg, Pennsylvania. During weekly mine examinations in 1998 conducted pursuant to 30 C.F.R. § 75.364, Petitioner scheduled work that needed to be preformed at the 218 left return, H panel belt, and 218 right return in the mine. In accordance with Petitioner’s customary practice, certified miners were scheduled to conduct 30 C.F.R. §75.361 supplemental examinations in these areas in lieu of pre-shift examinations, which were required by 30 C.F.R. § 75.360(b)(10). Immediately after the supplemental examinations were conducted, the same certified miners preformed the work.¹

A complaint was filed with the Mine Safety and Health Administration (hereinafter the “MSHA”), which alleged that Petitioner violated the pre-shift examination procedures 30 C.F.R. § 75.360 (b)(10) of the Act. On September 9, 1998, MSHA conducted an investigation of Emerald mine which resulted in a finding that Petitioner was in violation. A Citation was issued.

Petitioner appealed to the Office of Administrative Law Judges, challenging the validity of the citation. On April 4, 2000, Administrative Law Judge Gary Melick upheld the citation. He found that 30 C.F.R. § 75.360 (b)(10) requires pre-shift examinations to be performed “in areas ‘where work or travel is scheduled prior to the beginning of the pre-shift examination.’” *Rag Emerald Resources Corp. v. Secretary of Labor, Mine Safety and Health Administration (MSHA)*, 22 FMSHRC 519, (April 4, 2000), citing 30 C.F.R. § 75.360 (b)(10).

On January 29, 2001, Petitioner filed a Petition for Modification of Application of Mandatory Safety Standard 30 C.F.R. § 75.360(b)(10) with the Office of Standards, Regulations, and Variances of MSHA. By order dated August 6, 2002, MSHA denied the Petition for Modification.

On September 9, 2002, Petitioner filed a Request for Hearing on Partial Appeal of Petition for Modification of Application of Mandatory Standard. Thereafter, the case was referred for a hearing.

A formal hearing was held on December 10, 2002, in Pittsburgh, Pennsylvania.

¹ The work preformed at the left return was documented as “mopped float dust.” The work conducted at the H panel belt consisted of “set two posts” and the work performed at the 218 right return was listed as “set posts.”

II. Summary of the Parties Stipulations and Evidence

The parties agree on the following. The regulations require the operator to perform weekly, on-shift, pre-shift, supplemental, certified, or pumper examinations.² Weekly examinations must be performed at least every seven days. 30 C.F.R. § 75.364 (1) and (2). These inspections may occur at the same time as pre-shift and on-shift examinations. 30 C.F.R. § 75.364 (e) and (f)(1). A weekly examination consists of certified miners examining various locations in the mine to test for (1) methane and oxygen concentrations and air quantities and qualities; (2) proper air flow and; (3) hazardous conditions. 30 C.F.R. § 75.364 (1) and (2). If a “hazardous” condition or an “imminent danger” is detected during the examination, the condition must be corrected immediately. 30 C.F.R. § 75.364 (a)(1)-(2), (b) and (d).

All examinations must be performed by a certified miner. A certified miner is a person who passes certain examinations and tests and who has been certified in accordance with § 77.100 (b). 30 C.F.R. § 77.100 (a).

On-shift examinations must be performed for each shift in the three hour period proceeding each scheduled shift for areas where miners are assigned to work or in any area where mechanized mining equipment is being installed or removed during the shift. A certified miner must examine for hazardous conditions, oxygen deficiency, and determine if the air is moving in the proper direction. 30 C.F.R. § 75.362 (a)(1).

Supplemental examinations may be performed by a certified person in lieu of a pre-shift examination when work is scheduled after the commencement of a pre-shift examination. 30 C.F.R. § 75.361. A pre-shift examination must be conducted instead of a supplemental exam, when work is scheduled prior to the pre-shift examination period (Tr. 56). For example, if a pre-shift examination is scheduled for 5:00 a.m. to 8:00a.m. and Petitioner decides at 5:15 a.m. that additional work needs to be performed, a supplemental examination may be conducted (Tr. 57). If, however, Petitioner decides at 4:59 a.m. that work needs to be conducted, a pre-shift examination must be performed (Tr. 57).

It is the pre-shift examination required for scheduled work that is at issue in this case. A pre-shift examination must be made within three hours before every 8-hour work interval. Certified miners must examine all areas where work or travel is scheduled to test for hazardous conditions, methane and oxygen deficiency, and determine if the air is moving in its proper direction. 30 C.F.R. § 75.360(b)(10). If a pre-shift examination is not performed, miners may not enter or remain in any unexamined underground area of the mine. 30 C.F.R. § 75.360(a)(1). After a pre-shift examination is conducted, miners may enter the area at any time during the next

² In addition to the above-mentioned examinations, MSHA itself inspects the mine approximately 400 to 440 inspection shifts per year (Tr. 27). MSHA inspectors are able to enter areas of the mine which have not been pre-shift examined (Tr. 59). An “inspection shift” is defined as “one inspector at the mine for that shift.” (Tr. 27).

8-hour work interval (Tr. 50).

There is an exception for certain miners called pumpers. They are permitted to conduct examinations for hazardous conditions, test for methane and oxygen deficiency, and determine if air is moving in the proper direction in areas where pumpers are scheduled to work or travel, without the area being pre-shift examined, so long as the pumper is certified and the examination is performed before the work. 30 C.F.R. § 75.360 (2).

The examiners who perform weekly, on-shift, pre-shift, and supplemental examinations must certify that an examination was made by placing their initials, the date, and the time in the areas of examination. (Tr. 57). Pre-shift and weekly examination procedures require examiners to make a record of the results of the examination, the hazardous conditions and their locations, and the results and locations of the air and methane measurements. 30 C.F.R. § 75.360(f). In contrast, the pumper provision only directs the examiner to make a record if a hazardous condition is discovered. 30 C.F.R. § 75.363. Also, there is no recording requirement under the supplemental examination provision (Tr. 59).

III. Petitioner's Proposal

Several proposals have been submitted. The final one set out in the post hearing brief is as follows.

(a) A person may conduct an examination outside the time periods for the 8-hour interval examinations of the mine under 30 C.F.R. § 75.360 even if the work is scheduled in the area of examination prior to the beginning of the time periods in which the 8-hour fixed interval examinations are conducted at the mine if the following conditions are met.

- (1) Such examination shall be performed immediately before any work is performed;
- (2) Such examination shall include the area where such work is to be performed as well as the travelway to such area, if such travelway has not been previously examined under 30 C.F.R. § 75.360;
- (3) Such examination is performed by a certified person or persons as defined by 30 C.F.R. § 75.2;
- (4) Such examination shall include an examination for hazardous conditions, tests for methane and oxygen deficiency and a determination if the air is moving in the proper direction;
- (5) The work to be performed is in an area outside the normal fixed 8-hour interval examination routes that are utilized at the Emerald Mine, i.e., the work to be performed is located away from the active mining and travel areas;
- (6) The work to be done is minimal in nature such as, but not limited

- to, the installation of several posts to support the roof or “mopping” float dust;
- (7) The work to be done will be performed by a certified person or persons, as defined in 30 C.F.R. § 75.2, including the person or persons who performed the examination;
 - (8) The person performing the examination will certify, by initials, date and time, that the examination was made at enough locations to show that the area and the travelway to that area was examined.³

See Brief of Petitioner at 8-9.

IV. Map of Petitioner’s mine and Description of Petitioner’s Mine Operations

The following paragraphs describe the mining operations at Rag Emerald. For a more complete understanding, please detach Appendix A. The map contains designations (A) to (Q) that correspond to the same designations in the following text. Please refer to the key printed in red as you are reading the paragraphs. They correspond to similarly marked areas on the Appendix.

Emerald mine is a deep shaft mine which employs approximately 420 employees who are paid by the hour and 108 salaried employees (Tr. 27). The mine utilizes the longwall and continuous mining methods (Tr. 27, 29).⁴ Miners travel throughout the mine by battery operated vehicles which run on tracks. The tracks stop short of the face.⁵ Miners then walk to their desired locations (Tr. 31-32). The coal is hauled by a conveyor belt which is located in a separate entry from the track (Tr. 32).

There are ventilation systems and different types of entries. Air enters the mine through the number one and number seven air shafts and the slopes (Tr. 33)(A).⁶ The mine is ventilated by large fans which direct air through cement block walls which separate one entry from another (Tr. 32). The intake entry contains “fresh air,” or air that has not yet been used to ventilate the

³ Petitioner explained that these conditions are “more fully-developed” than the ones contained in the initial Petition for Modification.

⁴ A longwall is the most highly effective mining machinery used to cut coal in a rapid fashion. A continuous miner is machinery which is used to develop the blocks for mining the longwall and any other entries (Tr. 27).

⁵ The face is “[a]ny place in a coal mine in which work of extracting coal from its natural deposit in the earth is performed during the mining cycle.” Stipulations at 4.

⁶ A shaft is an opening (Tr. 33).

working sections of the mine.⁷ The return entry contains air that has already been used to ventilate the working sections which is sent out of the mine and the track entry has intake air (Tr. 32-33). The belt entry contains either intake air, which is used to either ventilate the faces or ventilate away from the faces to a return air section (Tr. 33).

The “mains” are the entries which lead to the area where the actual coal mining occurs (Tr. 34). The “northeast” main is a set of entries which are return air, track, and belt air courses (Tr. 34)(B). The “south” mains are submains set up for the mining of the longwall panels (Tr. 34)(C). The “north” mains are also submains which lead to the coal reserves and contain return and intake air courses (Tr. 34, 41)(D). The “east corridor” leads out to a second set of reserves and contains return and intake air courses (Tr. 34, 41)(E).

The B-block of coal is the next series of longwall panels which will be mined in the next two years (Tr. 34). The 11 North Section, or the “gate road”, contains three entry developments which will be part of the entries developed by a continuous miner for the next longwall panel (Tr. 35)(F). The first entry, or the “number one entry”, is located on the far left side of the map and is a belt entry (Tr. 35). The middle entry, or the “number two entry,” is the primary intake entry and the far right entry or the “number three entry” is the air return (Tr. 35). All three entries are separated by cement walls (Tr. 35). The 10 North Section is a gate road entry developed by continuous miners which helps set up for a longwall section (Tr. 36)(G). Longwall setups are the entries (Tr. 36). They are located where the gate road entries are cut across to connect each other and where the next longwall face will be developed (Tr. 36-37).

The 9 North Longwall is the longwall panel that is currently being mined (Tr. 37)(H). The “tailgate” is an entry that is located at one end of the longwall face and is not normally traveled. It is part of the ventilation system and consists of either intake or return air (Tr. 38)(I). The “headgate,” however, is where the employees travel. It is the entry where the belt system will transport the coal from the face. It contains a conveyor belt, a set of three entries, and a track which is also traveled by miners (Tr. 38)(J). The number one entry in the tailgate is an entry that will continue to be a belt entry used to transport coal out of the mine (Tr. 38). The number two entry is the primary intake and the number three entry may be either a return or an intake (Tr. 38). Unlike the tailgate which leads down to only one entry of active works, all three of the headgate entries will be kept open and active (Tr. 38-39).

The “GOB” is the area of the mine which contains previously mined longwall panels where the coal has been completely mined out (Tr. 39)(K). The “bleeders” are ventilation systems which are designed to protect the active areas of the mine by removing gas, particularly methane, which continues to generate in the mined out areas (Tr. 39)(L). The bleeder entries are required to be kept open and travelable (Tr. 40). However, the entries between the longwall and mined out longwall panels, or the “old gate road entries” are not travelable but continue to provide some

⁷ The working sections of the mine are the “active” areas where the coal mining is actually performed (Tr. 32).

ventilation (Tr. 40).

The “B Main Section” is the next series of longwall panels that will be developed by continuous miners (Tr. 40)(M). The “A Main Section” is the block of coal which is currently being developed and the “East Corridor Bleeders” contain continuous mining equipment (Tr.40-41)(N).

The “Slope” is an angled entry into the mine from the surface which has a track for supply handling and a belt system for hauling coal out of the mine (Tr. 41)(O). The number one shaft or portal is the building where miners may change for work and are taken by elevator to the mine (Tr. 41)(P). The “Seals” are MSHA approved walls which are designed to separate the inactive areas of the mine from the active areas (Tr. 42)(Q). The inactive areas are not ventilated and may not be accessed (Tr. 41).

The coal producing sections of the mine are staffed as follows. Petitioner operates three to four miner unit crews in the continuous miner area. Three units crews work around the clock in the North 11 Section and in the North 10 Section. The B-main and East Corridor sections are staffed by either one or two units which work around the clock (Tr. 43). In the longwall section, three crews work around the clock to operate the longwall itself (Tr. 43). The longwall setup, however, is staffed only when a longwall move is made (Tr. 43).⁸ Crews are not assigned to work every shift three shifts a day in the bleeders and no one is regularly assigned to work in the return airways (Tr. 44).

Petitioner employs coal miners who work in the above-mentioned sections, beltmen who maintain the belt system and the travel vehicles, laborers who perform various tasks to maintain the mines, and certified miners who examine the mine and perform the same work as other miners (Tr. 44).

V. The Legal Test for Modification

In order for a petition for modification of the application of a mandatory safety standard to be granted, Petitioner must show that “[a]n alternative method of achieving the result of the standard exists which will at all times guarantee no less than the same measure of protection afforded the miners of such mine by such standard” or that “[a]pplication of such standard to such mine will result in a diminution of safety to the miners in such mine.”⁹ 30 U.S.C. § 811(c).

⁸ During a longwall move, equipment is taken from the 9 North Longwall and set up at the top end of the 10 North Longwall Setup (Tr. 43). The crew works for several weeks and after the completion of the setup, they are transferred to other locations (Tr. 43).

⁹ Legislative history dictates that a judicial officer may only grant a petition for modification if “the petitioner clearly demonstrates that miners will not be exposed to greater health and safety risks if the petition is granted.” 55 FR 53430 citing S. Rep. No. 95-181, 95th

The alternative method standard requires a two part analysis. *UMWA, International Union v. MSHA*, 928 F. 2d 1200 (D.C. Cir. 1991). First, it must be determined whether the alternative method of compliance will “promote the same safety goals as the original standard with no less than the same degree of success.” *Id.* at 1202. Next, the net effect that the alternative method will have on overall mine safety must be considered by taking into account the advantages and disadvantages of the alternative method including, “effects unrelated to the goals of the original standard.” *Id.*

VI. Petitioner ’s Arguments

Petitioner argues that the undersigned should grant the Petition for Modification of the Application of Mandatory Safety Standard 30 C.F.R. § 75.360(b)(10). They contend that the only difference between § 75.360(b)(10) and the alternative method is timing (Tr. 69, 266). In support, the expert testimony of Mr. John Gallick, the Manager of Safety at Rag Emerald, and Mr. Schifko, a compliance foreman at Rag Emerald, is offered. Both testified that the proposed alternative method affords the same measure of protection that 30 C.F.R. § 75.360 (b)(10) currently provides (Tr. 68, 281). *See* Brief of Petitioner at 12-14.

Petitioner contends that the regular pre-shift examinations would continue to be conducted in the active areas of the mine and that the modification would only apply to out of the way areas where a minimal amount of work would be performed (Tr. 91).¹⁰ They argue that it is a safer practice to have an examiner perform pre-shift examinations in the regular routine areas of the mine and conduct the alternative method in the “off areas of work.” (Tr. 91). Under the alternative method, if a miner was sent to an out of the way area and could not perform the work in time to return to perform his regular pre-shift examination, he could leave the area without finishing the repairs since pre-shift examinations are considered “paramount” in the mining industry (Tr. 278-279).

Petitioner argues that the alternative method is as safe as the existing regulation 30 C.F.R. § 75.360(b)(10) since the alternative method’s examination is conducted in closer proximity to the

Cong., 1st Sess., at 25 (1977). Thus, the alternative method must protect against the same evil that the original regulation protects. In addition, the indirect safety aspects of a proposed modification must be taken in to account. If compliance with one safety standard makes it difficult to abide by another, the modification should be denied. However, if a modification is granted, then the final rule granting the modification should be “limited to time or by specific areas of a mine.” 55 FR 53430.

¹⁰ Mr. Gallick testified that the majority of the certified miners who would be conducting the alternative examinations and performing the work are union miners (Tr. 91). He stated that they would not necessarily be the same four certified miners who would perform the regular pre-shift examinations (Tr. 92).

performance of work (Tr. 69, 102-103, 283).¹¹ They say that the existing regulation permits a time lapse of up to eleven hours between the pre-shift examination and the performance of work for conditions to worsen (Tr. 283). The alternative method would require an examination to be performed immediately before the performance of work, Petitioner contends that the time period for conditions to change would be reduced (Tr. 283). *See* Brief of Petitioner at 12-13.

Petitioner also asserts that the alternative method reduces the time period in which conditions may change and the number of miners who may be exposed to hazards (Tr. 69-70, 78-79, 102-103, 297). In Petitioner's view, the current regulations expose miners to hazards twice since one miner performs a pre-shift examination and another miner must re-enter the area to perform the work. Petitioner explained that the alternative method, however, would require the same miner to conduct the examination and perform the work (Tr. 70, 78-79). *See* Brief of Petitioner at 12-13.

Petitioner maintains that alternative method's examination is identical to the §75.360(b)(10) examination.¹² Both examinations use the same testing equipment, are performed by certified examiners, test for the same hazards, and occur before work is performed (Tr. 65-66, 261-277). Also, unlike § 75.360(b)(10), Petitioner contends that the alternative method only permits certified miners to enter the area to perform work (Tr. 69-70, 74, 277, 297, 281). Petitioner argues that since the alternative examination would require the examining miner to repair the condition that he discovered, the examiner would be more familiar with the condition. (Tr. 69-70, 74, 277, 297, 281). An examiner would be able to request additional supplies and manpower if he discovers that more supplies are needed during the alternative examination (Tr. 96-97). *See* Brief of Petitioner at 11-13.

Petitioner contends that the alternative method is not a blanket waiver of section 75.360 (b)(10) and that it is logistically similar to the pumper and supplemental examination regulatory exceptions to § 75.360 (b)(10). According to Petitioner, the only difference between the pumper exception and the alternative method is the type of work. Petitioner explained that both methods are (1) premised on the fact that the miners travel to remote areas of the mine; (2) require certified miners to perform the examinations and; (3) permit examiners to examine for themselves (Tr. 55-56, 58, 70-71). Unlike the above-mentioned exceptions, the alternative method imposes additional conditions or limitations on the location of the work, the type of work, or the type of person who may perform the work. The pumpers are permitted to perform a broad range of work activities and the supplemental examination provision at § 75.361 does not restrict the amount or type of work which may be performed (Tr. 54,56). *See* Brief of Petitioner at 13,16-17.

¹¹ Petitioner explained that the *Federal Coal Mine and Safety Act of 1969*, PL 91-173 acknowledges that an examination closer in time provides a greater level of protection since its amendments changed the timing of pre-shift examinations from four hours to three hours before the shift. *See* Brief of Petitioner at 11-13.

¹² Section 75.360(b)(10) governs pre-shift examinations.

Petitioner maintains that MSHA's argument that the alternative method would lead to inadequate investigations since the examiners would be required to carry tools to the work site and would be ultimately responsible to fix the hazards that they discovered, fails. It is explained that MSHA stated in the 1996 rulemaking that pumpers would be able to make quality examinations and effectively perform their normal work duties despite the fact that they would carry their own tools and fix the hazards that they detected. (Tr. 129, 131, 151, 153). They say that under the alternative method, miners would carry a limited number and type of tools.¹³ (Tr. 148-149, 298). *See* Brief of Petitioner at 17-19.

Lastly, Mr. Gallick testified that he anticipates that the "minimal work" will take "probably no more than an hour" to complete (Tr. 80, 109). Mr. Schiffko stated that he believes that the term "minimal" does not take into account travel time because when a miner is traveling they are examining and are not working (Tr. 277). He said that less than 5% of the conditions discovered at Petitioner's mine are deemed a hazardous or dangerous. He explained that pursuant to Pennsylvania law, conditions which are deemed such must be corrected immediately or fenced off and conditions which are not classified as hazardous are assigned for work according to their relative danger (Tr. 276-277, 279-280). If a job is large, a pre-shift examination is performed (Tr. 278). A "large job" would "take several hours of work, several shifts, or several days" to repair (Tr. 278).

VII. MSHA's Arguments

MSHA argues that Petitioner has not proved that the proposed alternative method provides the same measure of protection that 30 C.F.R. § 75.360(b)(10) currently affords. They contend that the alternative method would adversely affect miners since it would remove the temporal separation between the examination and the performance of scheduled work and thereby cause miners to focus on two tasks at one time (Tr. 173). The alternative method would not guarantee that (1) hazardous conditions would not change between the time the weekly examination was performed and the time the miners were sent to repair a condition (Tr. 123); (2) the appropriate number of miners were sent to fix a hazard (Tr. 173); (3) the potential hazards would be detected before miners arrived to perform work (Tr. 173) or; (4) that the miners were equipped with the proper tools and safety equipment (Tr. 173). *See* Brief of MSHA at 12-13.

Mr. Monty L. Christo and Mr. Carl F. Kubincanek testified for MSHA.¹⁴ Mr. Christo

¹³ Petitioner explained that under the alternative method, mine examiners would carry an ax, a saw, or a homemade mopping device but not a pipe (Tr. 148-149). *See* Brief of Petitioner at 17. In addition, all of the certified miners under the alternative method would have their own examination tools (Tr. 298).

¹⁴ Mr. Monty L. Christo is a Mine Safety and Health Specialist and a Mining Engineer for the Mine Safety and Health Administration (Tr. 162). He has an extensive background in the

testified that Petitioner's alternative method should be denied because it is a blanket waiver of the pre-shift examination regulations, confuses the role of examiner and worker, and does not offer any safety benefit (Tr. 195-196). Mr. Kubincanek stated that Petitioner's alternative method is not as safe as § 75.360(b)(10).

It is MSHA's position that the regulations afford all miners, whether certified or non-certified, pre-shift examinations when work is scheduled (Tr.175). MSHA explained that under the current regulations, if work is scheduled before the beginning of the pre-shift examination period, a separate pre-shift examination must be performed even if certified persons are scheduled to perform the work (Tr. 180). In MSHA's view, examiners should not be considered a class of people who are not protected by the pre-shift examination provisions (Tr. 178). *See* Brief of MSHA at 21.

MSHA contends that pre-shift examinations should not be eliminated because they are an important routine examination and planning device. They explained that the purpose of adding the 8-hour interval language to Section 75.360 was to show the importance of routine pre-shift examinations and increase the frequency of such examinations. Mr. Christo testified that eliminating pre-shift examinations would result in inadequately planned work since pre-shift examinations are designed to detect hazardous conditions (Tr.170,171,175). Mr. John Gallick said that he believes in planning work and that not scheduling work would result in a MSHA enforcement action. (Tr. 73). *See* Brief of MSHA at 13-15.

MSHA maintains that supplemental examinations do not achieve the same purpose or level of safety as pre-shift examinations. (Tr. 183). Pre-shift examinations are the only means to alert miners of changing and hazardous conditions which are not discovered during weekly examinations (Tr. 123). Supplemental examinations have fewer reporting requirements than pre-shift examinations, are rarely utilized, and are only permitted when there is unanticipated work which has not been previously scheduled (Tr. 188-89). ¹⁵ They assert that supplemental exams only provide an examination for the miners who work on the same shift as the examiner and do not separate the examination from the scheduled work as required by § 75.360 (Tr. 172). *See* Brief of MSHA at 15.

MSHA points to a possible time lapse greater than the eleven hours that is mentioned by the Petitioner (Tr. 69,123-124). Under the Petition if a hazard were discovered pursuant to a

area of mine engineering (Tr. 164-165). He has also worked as a certified mine foreman, fire boss, supervisor of construction workers, and safety trainer (Tr. 164-165). Mr. Carl F. Kubincanek is a certified MSHA inspector and has worked for approximately twenty years in the coal mining industry (Tr. 248).

¹⁵ MSHA stated that the supplemental examination provision does not require an examiner to report hazardous conditions to the surface or keep a record of the results of the examination (Tr. 188-189).

weekly examination on a Wednesday and work was scheduled to repair that hazard on the following Monday, a pre-shift examination would not have to be performed before miners entered that area on Monday to perform the work (Tr. 258). Thus, during this five day period conditions could get worse (Tr. 259). *See* Brief of MSHA at 16.

MSHA further contends that the alternative method does not afford miners sufficient notice of the conditions that they will encounter (Tr. 144). A worsening of conditions may result in the miners not being equipped with the proper equipment and therefore, the only condition which could be repaired at that time would be the one which was initially identified (Tr. 259). Miners would then have to try to obtain the necessary supplies in an area close by or even leave the area to do so (Tr. 259). A pre-shift examination, however, warns miners in advance that they need additional material, enables work to be planned, and allows the work schedule to be adapted to meet the changing conditions (Tr. 259).

The only benefit of the proposal, MSHA contends, is a saving of time for the Petitioner (Tr. 254, 258). The UMW fire bosses who generally perform the weekly and pre-shift examinations would be the miners who would be responsible for conducting the alternative examinations (Tr. 255). *See* Brief of MSHA at 16-18.

MSHA next argues that Petitioner failed to prove that there are safety advantages to the alternative method which outweigh the disadvantages. The alternative method may cause a certified miner to sacrifice thoroughness of their routinely assigned pre-shift examinations because they would be required to rush to the out of the way sites to conduct the alternative examination (Tr. 155).

MSHA contends that the alternative method is vague and may be subject to a number of varying interpretations. The definition of “minimal work” does not take into account the distance to an area where work would be performed or the fact that there may be more than one out-by area noted in the weekly examination book as needed to be repaired (Tr. 253-254). MSHA argues that Petitioner’s alternative method is not clear as to whether all or only one of the certified miners who enter an area would conduct an examination (Tr. 255). It does not address what would occur when miners entered an area where the condition was larger than what they originally anticipated (Tr. 242). *See* Brief of MSHA at 18-20.

The pumper exception, MSHA contends, is unlike the exemption suggested by the Petitioner (Tr. 179). The alternative method eliminates pre-shift examinations in all “out of the way areas of the mine where previously reported hazards have existed for periods up to one week.” The pumper exception applies only to areas “where pumpers are scheduled to work or travel.” They also say that it is different because pumpers often work alone, travel along the same well defined route, and everyone is aware of the locations where the pumpers are scheduled to work (Tr. 179, EX 4). MSHA contends that the pumper exception provides a specific definition of the type of work which a pumper may do such as turning on pipes and closing valves. The

pumpers' examination is limited in scope. It relates only to pumps, not to other repair activities (Tr. 180). *See* Brief of MSHA at 21-22.

VIII. The United Mine Workers of America's Arguments

The UMWA asserts that Petitioner's proposed modification does not abide by the paramount purpose of the Mine Act, to guarantee safety to miners. They see it as a time saving mechanism which compromises miners' health and safety (Tr. 124-125). It does not prove that it will not cause a lessening of safety to miners. It calls for the elimination of 30 C.F.R. 75.360 when "minimal" work is performed in remote sections of the mine and it provides no additional protection in its place. *See* Brief of UMWA at 1-2, 6-7.

Mr. Charles B. Cox, Chairman of the Safety Committee and a mechanic at Petitioner's mine and Mr. Floyd Campbell, one of Petitioner's hourly employees and a certified mine examiner, were called by the union. They testified that Petitioner's alternative method is not as safe as the existing pre-shift examination regulation (Tr. 140, 145).¹⁶

The UMWA asserts that Petitioner is attempting to extend the pumper exception at 30 C.F.R. 75.360(a)(2) to all certified miners. They contend that the pumper exception was granted during a different period of time and for different purposes. *See* Brief of UMWA at 2-3.

The primary problem, the UMWA contends, is that certified miners would have to conduct an examination and perform work. The certified miners would be required to carry supplies and examine as they travel. Such dual functions, in the UMWA's view, would hinder the performance of both tasks. (Tr. 173). Mr. Cox and Mr. Campbell testified that it is difficult and not as effective to perform a pre-shift examination and to work at the same time (Tr. 119, 131-32, 143-44). *See also* Brief of UMWA at 4-5.

The UMWA argues that Petitioner's proposed modification would expose miners to increased risk of harm because it would eliminate daily pre-shift examinations in certain areas. Weekly examinations would provide the only means of detecting continuously changing hazardous conditions (Tr. 46, 95-96).¹⁷ The UMWA states that non-certified persons may be more qualified than certified persons to perform work since they have more experience performing various types of jobs (Tr. 125). Under the Petitioner's proposal, such persons could

¹⁶ Mr. Cox is Vice President, but currently acting as President, of the local union and Chairman of the Safety Committee (Tr. 117). He is a certified examiner and has worked in the mines for approximately 30 years (Tr. 118). Mr. Cox performs pre-shift examinations and has performed weekly examinations (Tr. 118). He has had extensive training in various mining subjects (Tr. 119). Mr. Campbell has been a mine examiner for sixteen years and regularly performs weekly and pre-shift examinations (Tr. 144).

¹⁷ Mr. Cox testified that conditions may change within an hour (Tr. 124).

not do the pre-shift exam. *See* Brief of UMWA at 4-5.

The definition of minimal is troublesome to the UMWA. They point to travel to and from work as an activity that is not considered under the term. *See* Brief of UMWA at 5. They see “minimal” as inherently vague because they fear abuse from too liberal an interpretation. *See* Brief of UMWA at 5-6.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

IX. DISCUSSION AND ANALYSIS

It must be determined whether an alternative method achieves the same safety protection as the original regulatory standard 30 C.F.R. § 75.360(b)(10). 30 U.S.C. § 811(c). It must be decided whether “the alternative method will promote the same safety goals as the original standard with no less than the same degree of success.” *UMWA, International Union v. MSHA*, 928 F. 2d 1200, 1202 (D.C. Cir. 1991). Lastly, the effect on overall mine safety, taking into account both the “advantages and disadvantages of the alternative method, including effects unrelated to the goals of the original standard” must be reviewed. *Id.* at 1202.

The purpose of the pre-shift examination procedure is to detect and notify miners of hazardous conditions which may affect their health and safety, ensure the effectiveness of the ventilation system, and plan work (JX D). Pre-shift examinations were not intended to be performed in the idle areas of the mine. They were designed to be conducted “where persons work or travel during the oncoming shift and other locations where potential hazards can develop that are likely to threaten the safety of miners in active working areas.” (JX C).

The regulations require pre-shift examinations to be performed within a three hour period before the eight hour shift where scheduled work is being done in areas where the actual mining occurs and in locations outside of the active mining sites. After the examination, the examiner must leave the area and a certified or non-certified miner(s) must again travel to the area to repair the conditions which were discovered during the examination. At issue is whether an examination may be performed immediately before the performance of work which was identified during the weekly examinations in the areas located outside of the active mining sites.

In each scenario, the same substantive tests are administered. Both examinations require a certified miner to examine the travel and work areas, to test for methane and oxygen deficiency, and determine if air is moving in the proper direction before work is performed. The time that the examinations and the work must be performed varies. Under the regulations, an exam must be conducted within a three hour period prior to the eight hour work shift and the work may be done at any time during the next eight hour shift. Under the alternative method, an exam is performed immediately before the work is to be done.

The Petitioner points out that the eleven hours between the regulations pre-shift examination and the actual work provides the same opportunity for additional problems to develop. They also expose an unlimited number of miners to the danger. These miners are not required to be accompanied by a certified miner who would be more able to recognize the nature of the danger.

There is a safety risk and benefit under both methods. The question is whether one is less safe than the other. The regulation limits the time during which problems could develop in the period following the weekly safety exam. It does, however, leave a time period up to eleven hours during which a situation could worsen and expose the repair crew to unexpected trouble.

Under the modification, the time period from the weekly exam for problems to occur or worsen will exist right up to the time the supplemental exam is done. There is, however, no time for a problem to develop before the repair work begins.

Each method limits the danger. They both recognize and address the problem of a worsening of conditions. The shorter time period for the development of trouble is affected by protection of a certified miner accompanying the work party. Both are equally safe.

A danger can occur at any time. The two methods require a balancing. The fact that the regulations limit the time for worsening to occur is offset by the fact that the modification requires a certified miner to accompany the repair crew. Such an individual is more likely because of his expertise to recognize and evaluate the potential danger or problem. Along with the limitation on the carrying of the repair material, the expertise of this individual in recognizing the nature of the damage makes it as safe as the regulation. The regulation exposes the repair crew to increased danger without the benefit of a fresh unburdened safety expert. Both are found to be equally safe.

The next issue is the dual responsibility of the examiner under the modification procedure. The Department of Labor (the "DOL") and the UMWA agree that a person who must do a safety exam and participate in the repair work is at a disadvantage. Because he participates in the work, he is expected to carry some of the tools and material needed to complete the job. The material is heavy and could cause fatigue. Despite best intentions, that individual would be tired and might be less aware of danger during the walk into the mine and at the time the work begins when he does his safety check. The DOL's and the UMWA's witnesses both expressed this opinion. Coming from individuals who do the work, this opinion is very convincing. This aspect of the modification must be found to not provide equal or greater safety than that required by the regulations.

Despite this finding, it is possible with a minor amendment to the modification to eliminate the problem and make the alternate proposal as safe as the regulatory requirement. The modification should require designating one member of the crew as the safety examiner. The second would prohibit the certified miner so designated from carrying any equipment not carried

on the weekly or pre-shift exams. The problem of fatigue and distraction would be eliminated. The change would permit the person so designated to take part in the repair upon completion of the exam. The only extra burden to the employer is that all materials needed for repair would be carried by others in the work party.

I also find that the alternative method's requirement that the examination and the work be performed by a certified person is advantageous. Although the UMWA argues that certified persons are less capable of performing work since non-certified persons have more experienced performing repairs, I find that certified persons may be more capable in certain situations. Certification merely requires a miner to undergo specific tests and training in order to perform *examinations*, they do not receive similar training and/or have to take tests which would enhance their ability to perform *work*. However, since the miners who perform the weekly examinations are the miners who would be likely to perform the alternative examinations and are more familiar than the average miner with the areas of the mine where they would be sent to repair, they may be more capable of traveling to these locations.

Another problem identified by the DOL and the UMWA is the ambiguous nature of "minimal" as it describes work to be done. They suggest the employer could have a variable definition which could allow larger repair projects with a large crew. In effect, this could lead to a total elimination of pre-shifts as it was intended in the regulations.

The employer answers by citing examples and promising that the work would not involve major repair. This does not solve the problem because the terms are still subjective and could accommodate varying amounts of work.

As written, the amount of work and the number of miners who might participate are unclear. This runs the risk of substituting this type of examination for activities that the regulations call for the normal pre-shift. This results in a condition which is not as safe as originally intended.

A clarification and more precise description would eliminate the safety problem. "Minimal" should identify the number of miners sent on these repair details. Limiting the crew sent under the modified procedure to between two and four miners, especially since one of the crew would be designated examiner and would be restricted from carrying repair materials, would ensure the minor or minimal nature of the activity.

The definition of minimal must also address what would occur when an examiner enters an area and discovers that he does not have the proper equipment and/or sufficient manpower. Under the regulations, an examiner would leave the area and notify the miner(s) designated to perform the work that more supplies and additional manpower were needed. The proposal, however, would provide the miners three options. They could either leave the area to obtain the additional supplies, call out for more equipment and/or manpower, or not perform the work. If the miners chose one of the first two options, they would have to wait at the work site for the

supplies and/or the workers to be sent to the site or, travel out of the site to obtain the manpower and equipment and again travel back to the area.

As a result, the miners would not be provided the same level of notice that the regulations afford. The amount of time that the miners would be exposed to hazardous conditions would be increased.

The third option, to leave the area and not perform the work, proves to be as safe as the pre-shift examination procedures. Leaving the area would enable the miner to inform others of the changed conditions. Therefore, I find that the term minimal work shall not include the instances where miners discover that additional equipment and/or manpower is needed to complete a repair. In this situation, the alternative method shall not be permitted and the normal pre-shift examinations must be used.

The alternative method also lacks guidance as to what would occur when the miners are scheduled to perform pre-shift examinations and alternative examinations on the same day. MSHA and the UMWA assert that if the exams are scheduled too close to one another, miners would be forced sacrifice the thoroughness of one of the examinations in order to rush to perform the other. Because pre-shift examination procedures are considered paramount in the mining industry, I find that Petitioner's proposal must include the following condition:

The operator must schedule ample time between the alternative and pre-shift examinations in order for thorough and complete examinations to be performed. An examiner performing the alternative examination and the rest of the crew must immediately leave the alternative examination site if the examiner is unable to complete the examination in time to travel to the regularly scheduled pre-shift examination. An examiner performing a pre-shift examination must not sacrifice the thoroughness of the pre-shift examination in order to rush to the alternative examination site.

MSHA and the UMWA also argue that the alternative method is not similar to the two regulatory exceptions to the pre-shift examination procedures. Although there appears to be some similarities between Petitioner's proposal and the exceptions, the exceptions vary too greatly to grant the Petition on this basis. The exceptions were designed for different situations and were intended for different purposes.

When the pumper exception was promulgated, the rule makers explained that the exception was adopted since pumpers normally work alone, perform limited work activities, and travel in remote areas of the mine (JX D). The alternative method permits a crew of miners to correct a broad range of hazards. The purpose behind the pumper provision, the equipment that a pumper carries, the type of work that a pumper performs, and the number of pumpers sent to a particular area differ.

The alternative method is more similar to the supplemental examination exception since a supplemental examination may be performed in lieu of a pre-shift examination when work is scheduled *after* the commencement of the three hour pre-shift period. Supplemental examinations were intended to be used in situations where miners are “sent to perform unscheduled tasks in remote areas of the mine that have not been pre-shifted”, not when tasks are scheduled *before* the pre-shift examination interval (JX C).

Both the supplemental and alternative examinations have less stringent recording requirements than the pre-shift examination provisions. After an examiner completes a supplemental examination or an alternative examination, he must certify by his initials, the date, and the time in the area of examination that an examination was conducted. In contrast, after a pre-shift examination is performed, the examiner must not only certify that an examination was made, but must also, make a record of the conditions discovered during the examination. Although MSHA argues that the reduced recording requirements make the alternative method inferior to the pre-shift examination, it is not found that the pre-shift examination recording requirements should be required under the alternative method. The pre-shift examination record provides notice to the miners who would be assigned to perform the work of the conditions which changed from the time the weekly examination was performed. Since under the alternative method miners would be sent to perform the examination and the work at the same time, the work would be completed before the examiner left the area, and the alternative exam would not apply in situations where conditions have changed, a record of the changed conditions would not be necessary.

In addition, consideration of the advantages and disadvantages of the alternative method, the net effect that the modification will have on the overall mine safety must be reviewed. The special terms and conditions attached above to the alternative method compensate for the disadvantages of the proposal. In summary, the limitation imposed on the number of miners who may be sent into an area reduces the number of miners who may be exposed to hazardous conditions. Requiring one certified miner to perform an examination while the other miner(s) carry the work equipment, offsets the possibility that a miner may become tired and fail to perform an effective inspection. Also, sending a miner(s) to conduct the examination and perform the work at the same time, eliminates the amount of travel time in which a miner(s) may be exposed to hazardous conditions. Lastly, clarifying that the definition of “minimal work” does not include the situations where miners are not equipped with the proper equipment and/ or manpower enables miners to receive the same type of notice that the regulations currently afford. Thus, after the disadvantages are counterbalanced by the additional conditions, the net effect of the modification is to establish an examination which is conducted in closer proximity to the performance of work and eliminate the period in which conditions may change. It will not merely save the operator time. Rather, the alternative examination will reduce the amount of time in which miners are exposed to hazardous conditions.

The alternative method, together with the special terms and conditions contained herein, achieves the result of 30 C.F.R. § 75.360(b)(10) and at all times guarantees no less than the same

measure of protection afforded to the miners of such mine by such standard. The modification and the additional conditions promote the same safety goals and achieve the same result as 30 C.F.R. § 75.360(b)(10). They detect and notify miners of hazardous conditions which may affect their health and safety, ensure the effectiveness of the ventilation system, and enable the operator to adequately plan work. Accordingly,

ORDER

IT IS HEREBY ORDERED THAT:

- (I.) Petitioner Rag Emerald's request for the modification of mandatory safety standard 30 C.F.R. § 75.360(b)(10) is **GRANTED AS AMENDED**.
- (II.) 30 C.F.R. § 75.360(b)(10)(a) shall be amended to read as follows:

A person may conduct an examination outside the time periods for the 8-hour interval examinations of the mine under 30 C.F.R. § 75.360 even if the work is scheduled in the area of examination prior to the beginning of the time periods in which the 8-hour fixed interval examinations are conducted at the mine if the following conditions are met.

- (1) Such examination shall be performed immediately before any work is performed;
- (2.) A minimum of two miners must be sent to do the repair.
- (3.) The operator must schedule ample time between the alternative and pre-shift examinations in order for thorough and complete examinations to be performed.
- (4.) An examiner performing the alternative examination and the rest of the crew must immediately leave the alternative examination site if the examiner is unable to complete the examination in time to travel to the regularly scheduled pre-shift examination.
- (5.) An examiner performing a pre-shift examination must not sacrifice the thoroughness of the pre-shift examination in order to rush to the alternative examination site.
- (6.) If two miners are sent to an area, the operator shall designate in advance one miner to carry the testing equipment and perform an examination of the travel and work areas and a different miner(s) to

carry the repair equipment. At absolutely no time shall the examining miner carry the repair equipment.

- (7.) Such examination shall include the area where such work is to be performed as well as the travelway to such area, if such travelway has not been previously examined under 30 C.F.R. § 75.360;
- (8.) Such examination is performed by a certified person or persons as defined by 30 C.F.R. § 75.2;
- (9.) Such examination shall include an examination for hazardous conditions, tests for methane and oxygen deficiency and a determination if the air is moving in the proper direction;
- (10.) The work to be performed is in an area outside the normal fixed 8-hour interval examination routes that are utilized at the Emerald Mine, i.e., the work to be performed is located away from the active mining and travel areas;
- (11.) The work to be done is minimal in nature. Minimal work shall be limited to work which requires a minimum of **TWO** (2) miners and a maximum of **FOUR** (4) miners to complete. It shall **NOT** include a situation where miners are sent to an area and discover that additional equipment and/or manpower is needed to complete a repair. In this situation, the alternative method shall not be used and the normal pre-shift examination procedure must be utilized.
- (12.) The work to be done will be performed by a certified person or persons, as defined in 30 C.F.R. § 75.2, including the person or persons who performed the examination;
- (13.) The person performing the examination will certify, by initials, date and time, that the examination was made at enough locations to show that the area and the travelway to that area was examined.

- (III.) Pursuant to 30 C.F.R. 44.4 (c), the modification, together with all of the additional terms and conditions stated in this Order, shall have the same effect as 30 C.F.R. § 75.360(b)(10).

A

GERALD M. TIERNEY
Administrative Law Judge

APPEALS:

The Administrative Law Judge's Decision and Order may be appealed within 30 days to the Assistant Secretary of Labor for Mine Safety and Health. All appeals of the Administrative Law Judge's decision are filed with: Assistant Secretary for Mine Safety and Health, U.S. Department of Labor, Room 2322, 1100 Wilson Boulevard, Arlington, Virginia 22209-3939